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Baker Donelson Bearman, Caldwell & Berkowitz, PC 555 Eleventh Street, NW, Sixth Floor Washington, DC 20004				
EXAMINER				
OTHER, BRENT T				
ART UNIT		PAPER NUMBER		
1783				
NOTIFICATION DATE		DELIVERY MODE		
07/07/2010		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### Office Action Summary

**Application No.**

10/563,256

**Applicant(s)**

WILFER ET AL.

**Examiner**

BRENT T. O'HERN

**Art Unit**

1783

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 07 December 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,2,4-6,8,9 and 11-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-6,8,9 and 11-23 is/are rejected.
- 7) ☒ Claim(s) 11-13 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB06)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

#### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/7/2009 has been entered.
2. Claims 1-2, 4-6, 8-9 and 11-23 are pending.

### **WITHDRAWN REJECTIONS**

3. All rejections of record in the Office action mailed 7/7/2009 have been withdrawn due to Applicant's amendments in the Paper filed 10/30/2009.

### **NEW OBJECTIONS**

#### ***Claim Objections***

4. Claims 11-13 are objected to because of the following informalities: claims 11-13 depend on cancelled claim 10. Appropriate correction is required.

### **NEW REJECTIONS**

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 6, 8-9, 11-16 and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
7. The phrases "the fraction", "the component a)", "in each case" and "the total weight" in claim 6, lines 1-2, "the component b)" and "the action of water" in claim 8, lines 1-2, "the fraction", "the component b)" and "the total weight" in claim 9, lines 1-2, "the inorganic filler" in claim 11, lines 1-2, "the organic filler" in claim 12, lines 1-2, "the fraction of the filler" and "in each case" in claim 13, lines 1-2, "its water" in claim 14, line 1, "it is" in claims 15, 16, 18 and 21, line 1 of all claims have insufficient antecedent basis for these limitations in the claims.
8. The phrase "the total weight of the thermoplastic mixture is not greater than 40% by weight" in claim 13, lines 2-3 is vague and indefinite since it is unclear whether this language is optional as the "filler" language infers that filler is present, however, the "not greater than 40%" language includes the lower limit of zero which is non limiting.

Clarification and/or correction required.

***Claim Rejections - 35 USC § 102***

9. Claims 11-13 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Anderson et al. (US 6,231,970). Claims 11-13 depend on cancelled claim 10, thus, said claims are interpreted as independent claims.

Anderson ('970) teaches a tubular food casing having inorganic fillers such as titanium dioxide and glass fibers or organic fillers such as carbohydrates, polysaccharides, and/or a derivative thereof (*See col. 18, l. 65 to col. 19, l. 33, col. 25, ll.*

14-18, col. 26, ll. 62-66, col. 27, ll. 10-16, col. 28, l. 34+, col. 31, ll. 33-48 and col. 33, l. 32+.) with the claimed amount of filler (See col. 18, ll. 57-64 and col. 20, ll. 46-55.). The amount of filler in claim 13 includes zero % which is non limiting, thus, optional.

***Claim Rejections - 35 USC § 103***

**10.** Claims 1-2, 4-6, 8-9, 11-15, 17, 19-20 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hisazumi et al. (US 4,764,406) in view of Anderson et al. (US 6,231,970) and Delius et al. (US 2002/0065364).

Regarding claims 1-2 and 8, Hisazumi ('406) teaches a smoke and water vapor permeable tubular food casing (See *Abstract and col. 3, ll. 16-30 and col. 4, ll. 20-21, tubular.*) made of polyamides and copolyamides (See *Abstract, col. 3, ll. 16-30, col. 8, ll. 12-24.*) which are impregnated with liquid smoke on the food-facing side (See *col. 8, ll. 12-45 wherein the sausage is smoked with the smoke residue that adheres to the sausage is interpreted as being liquid smoke otherwise the smoke would dissipate without the smoke having a smoked flavor.*), and (See *Abstract, col. 3, ll. 16-30, col. 8, ll. 12-24.*), and at least one thermoplastic other polymer or copolymer, wherein the thermoplastic other polymer or copolymer is hydrophilic, water-soluble and swells under the action of water or water vapor (See *Abstract, col. 3, ll. 16-30, col. 8, ll. 12-24 wherein the hydrophilic copolymer is ethylene-vinyl alcohol. See also p. 7, ll. 12-13 of Applicant's Specification where Applicant discloses ethylene-vinyl alcohol as being hydrophilic. Thus, the ethylene-vinyl alcohol as taught by Hisazumi ('406) is interpreted as being hydrophilic. Since the material is the same hydrophilic polymer as Applicant discloses in the Specification as swelling then Hisazumi's ('406) material is also*

*interpreted as able to swell.*), however, fails to expressly disclose the casing comprises and organic or inorganic filler and contains at least one additive from a dye or a color pigment.

For the purposes of searching for and applying prior art under 35 U.S.C. 102 and 103, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, “**consisting essentially of**” will be construed as equivalent to “comprising”. See, e.g., PPG, 156 F.3d at 1355, 48 USPQ2d at 1355 (“PPG could have defined the scope of the phrase consisting essentially of” for purposes of its patent by making clear in its specification what it regarded as constituting a material change in the basic and novel characteristics of the invention.”). MPEP 2111.03 Also, if an applicant contends that additional steps or materials in the prior art are excluded by the recitation of “consisting essentially of,” applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant’s invention. In re De Lajarte, 337 F.2d 870, 143 USPQ 256 (CCPA 1964).

However, Anderson (‘970) teaches a tubular food casing having inorganic fillers such as titanium dioxide and glass fibers or organic fillers such as carbohydrates, polysaccharides, and/or a derivative thereof (*See col. 18, l. 65 to col. 19, l. 33, col. 25, ll. 14-18, col. 26, ll. 62-66, col. 27, ll. 10-16, col. 28, l. 34+, col. 31, ll. 33-48 and col. 33, l. 32+.*) with the above amount of filler (*See col. 18, ll. 57-64 and col. 20, ll. 46-55.*) for the purpose of providing a casing with swellable materials that are cost effective and easy to process (*See col. 19, ll. 1-33.*).

Therefore, it would have been obvious to a person having ordinary skill in the art to incorporate the materials as taught by Anderson ('970) in Hisazumi ('406) in order to provide a casing that is swellable, cost effective and easy to process.

Delius ('364) teaches a sausage casing (*See Abstract.*) containing conventional additive pigments (*See para. 36.*) for the purpose of providing a moist food/sausage having the desired color (*See para. 11.*).

Therefore it would have been obvious to provide Hisazumi's ('406) casing with a pigment in order to provide a sausage casing with the desired color.

Regarding claim 4, Hisazumi ('406) teaches the casing being made from polycaprolactam (nylon 6) (*See col. 6, ll. 42-45 and col. 8, ll. 12-25.*).

Regarding claim 5, Hisazumi ('406) and Anderson ('970) teach the casing discussed above, however, fail to expressly disclose wherein the polyamide or copolyamide forms therein a coherent phase.

However, Delius ('364) teaches a sausage casing (*See Abstract.*) having a polymer blend with a coherent phase made from an aliphatic copolyamide (*See Abstract and paras. 18-24.*) for the purpose of providing a moist food/sausage (*See para. 11.*).

Therefore, it would have been obvious to a person having ordinary skill in the art at the time Applicant's invention was made that Hisazumi's ('406) casing is coherent since it is the same as claimed or it would have been obvious to provide a polymer blend with a coherent phase made from an aliphatic copolyamide as taught by Delius ('364) in Hisazumi ('406) in order to provide a moist food.

Regarding claim 6, Hisazumi ('406) teaches wherein the fraction of the component a) in each case based on the total weight of the mixture is 40 to 90 % by weight (*See col. 3, ll. 16-30.*).

Regarding claim 9, Hisazumi ('406) teaches wherein the fraction of the component b) in each case based on the total weight of the thermoplastic mixture, is 10 to 60 % by weight (*See Abstract, col. 3, ll. 16-30.*).

Regarding claims 11-13 and 22, Hisazumi ('406) and Delius ('364) teach the casing discussed above, however, fail to expressly disclose wherein the thermoplastic mixture additionally contains at least one organic or inorganic filler, wherein the inorganic filler comprises quartz powder, titanium dioxide, talcum, mica and other aluminosilicates, glass staple fibers and other mineral fibers and/or glass microspheres, wherein the organic filler is a polysaccharide, and wherein the polysaccharide is starch, cellulose, exo-polysaccharides, a polysaccharide derivative, crosslinked starch, starch ester, cellulose ester, cellulose ether, or carboxyalkylcellulose ether and not greater than 40% by weight.

However, Anderson ('970) teaches a tubular food casing having inorganic fillers such as titanium dioxide and glass fibers or organic fillers such as carbohydrates, polysaccharides, and/or a derivative thereof (*See col. 18, l. 65 to col. 19, l. 33, col. 25, ll. 14-18, col. 26, ll. 62-66, col. 27, ll. 10-16, col. 28, l. 34+, col. 31, ll. 33-48 and col. 33, l. 32+.*) with the above amount of filler (*See col. 18, ll. 57-64 and col. 20, ll. 46-55. The amount of filler in claim 13 includes zero % which is non limiting, thus, optional.*) for the



purpose of providing a casing with swellable materials that are cost effective and easy to process (*See col. 19, ll. 1-33.*).

Therefore, it would have been obvious to a person having ordinary skill in the art to incorporate the materials as taught by Anderson ('970) in Hisazumi ('406) in order to provide a casing that is swellable, cost effective and easy to process.

Regarding claim 14, Hisazumi ('406) teaches the casing discussed above and obviously teaches the product having a water vapor permeability (WVP), determined as specified in DIN 53 122, with air impinging the casing on a single side at 23°C and at a relative humidity of 85 %, is at least 30 g/m<sup>2</sup>d (*See col. 3, ll. 27-30 where Hisazumi ('406) teaches a WVTR of not more than 70 g/m<sup>2</sup>d at 40°C and at a relative humidity of 90 %, thus, a person having ordinary skill in the art would reasonably infer that the water vapor permeability (WVP) would be at least 30 g/m<sup>2</sup>d under the above conditions as the structure of the casing would not change to such an extent that the WVP would decrease below the claimed range as the intent of the casing is for it to be effectively permeable to smoke.*).

Regarding claim 15, Hisazumi ('406) teaches the casing being multilayered (*See Abstract and col. 3, ll. 16-30.*).

Regarding claim 17, Hisazumi ('406), Anderson ('970) and Delius ('364) teach the casing discussed above, however, fail to expressly disclose the liquid smoke being acidic, however, it is known in the art that smoke generated during smoking is acidic (*See Abstract, col. 3, ll. 16-30 and col. 8, ll. 12-45.*), therefore, it would have been obvious to provide a smoke that is acidic in order to provide a pleasant tasting sausage.

Regarding claim 19, Hisazumi ('406), Anderson ('970) and Delius ('364) teach the casing discussed above, and a method of making a water-vapor- and smoke-permeable tubular casing based on polyamide, however, fails to expressly disclose closing the casing and storing the stuffed casing.

However, it would have been obvious to close the above stuffed casing and store the product so as to provide a sanitary product that is isolated from dirt and ready for sale as opposed to having a customer wait for the sausage to be made. Therefore, it would have been obvious to close and store Hisazumi's ('406) product in order to provide a clean and ready to clean/use product.

Regarding claim 20, Hisazumi ('406) teaches wherein the food casing contains a smoked sausage or cheese (*See col. 7, ll. 25-31.*).

11. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hisazumi et al. (US 4,764,406) in view of Anderson et al. (US 6,231,970), Delius et al. (US 2002/0065364) and Okudaira (US 6,294,263).

Hisazumi ('406), Anderson ('970) and Delius ('364) teach the casing discussed above, however, fail to expressly disclose the casing being biaxially stretched and heat set.

However, Okudaira ('263) teaches a tubular and seamless casing (*See col. 7, ll. 55-60.*), biaxially oriented (*See col. 7, ll. 16-30.*) and a heat-set polyamide-based food casing (*See col. 7, ll. 7-15.*) for the purpose of providing a fatigue resistant casing (*See col. 1, ll. 54-62.*).

Therefore, it would have been obvious to a person having ordinary skill in the art at the time Applicant's invention was made that Hisazumi's ('406) casing has the above properties since the casing is the same or it would have been obvious to provide Hisazumi's ('406) casing with a polyamide having the above properties as taught by Okudaira ('263) in order to provide a casing that is fatigue resistant.

**12.** Claims 18 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hisazumi et al. (US 4,764,406) in view of Anderson et al. (US 6,231,970), Delius et al. (US 2002/0065364) and Hammer et al. (US 5,501,886).

Hisazumi ('406), Anderson ('970) and Delius ('364) teach the casing discussed above, however, fail to expressly disclose the casing being shirred and seamless.

However, Hammer ('886) teaches tubular, seamless, shirred sausage (*See col. 5, ll. 10-13 and col. 10, ll. 57-60, seamless and shirred.*) for the purpose of providing a pliable material that can easily be stored and handled (*See col. 12, ll. 5-9.*).

Therefore, it would have been obvious to use casing that are seamless and shirred as taught by Hammer ('886) in Hisazumi ('406) in order to provide a material that is pliable and can easily be stored and handled.

**13.** Claim 23 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hisazumi et al. (US 4,764,406) in view of Anderson et al. (US 6,231,970), Delius et al. (US 2002/0065364) and Krallmann et al. (US 2003/0059502).

Hisazumi ('406), Anderson ('970) and Delius ('364) teach the method and food casing discussed above, however, fail to expressly disclose wherein the food is a sausage emulsion or raw sausage emulsion.

However, Krallmann ('502) teaches an encased smoked sausage emulsion (*See para. 34.*) for the purpose of providing an encased smoked sausage (*See para. 2.*).

Therefore, it would have been obvious to produce an encased sausage emulsion as taught by Krallmann ('502) in Hisazumi ('406) with the method discussed above in order to provide an encased tubular sausage.

#### **ANSWERS TO APPLICANT'S ARGUMENTS**

**14.** In response to Applicant's arguments (*See p. 5, para. 3 to p. 6, para. 2 of Applicant's Paper filed 10/30/2009.*) that the food casing as claimed refers to a composition that does not include polyolefins and Hisazumi ('406) refers to polyolefins, it is noted that Applicant appears to be referring to amended claim 1 and not the previously presented claim 1. Amended claim 1 is discussed above. The previously presented claim does not negatively exclude or exclude otherwise polyolefins as negative language is not set forth and the "comprises" language is used. Applicant's comments regarding the "water soluble" language added to amended independent claim 1 is new language and not present in cancelled dependent claim 10.

**15.** In response to Applicant's arguments (*See p. 6, paras. 3-4 of Applicant's Paper filed 10/30/2009.*) that dependent claim 14 is not anticipated or obvious over Hisazumi ('406) for the reasons set forth regarding amended independent claim 1, it is noted that no further precise arguments are set forth than discussed above.

**16.** In response to Applicant's arguments (*See p. 6, paras. 5-7 of Applicant's Paper filed 10/30/2009.*) that Delius ('364) does not teach dependent claim 5 because Delius ('364) does not teach a "water-soluble" polymer, it is noted that the previously presented

dependent claim 5 and independent claim 1 do not set forth limitations directed to a "water-soluble" polymer. The "water-soluble" language is added with this amendment (Applicant's Paper filed 10/30/2009.).

**17.** In response to Applicant's arguments (*See p. 7, paras. 1-5 of Applicant's Paper filed 10/30/2009.*) that Okudaira ('263) does not teach the organic and inorganic fillers per amended claim 1, and the film being heat set, because none of Okudaira's ('263) additives can be considered fillers, it is noted that Applicant's filler language is broad and Okudaira ('263) does teach fillers as made of record. Applicant does not precisely rebut any of the fillers taught by Okudaira ('263) and explain why they are not inorganic or organic fillers. Okudaira's ('263) film disclosed at col. 7, ll. 16-30 is interpreted as being heat set which Applicant does not precisely rebut.

**18.** In response to Applicant's arguments (*See p. 7, paras. 6-7 of Applicant's Paper filed 10/30/2009.*) that it would not have been obvious to incorporate the fillers as taught by Anderson ('970) into Hisazumi ('406) because the composition of Anderson's ('970) and Hisazumi's ('406) films are different and even if they were the same then Hisazumi's ('406) modified casing would not be smoke permeable, it is noted that although Anderson's ('970) and Hisazumi's ('406) films are not identical they both teach the same basic polyamide type of films that Applicant claims. The fillers disclosed by Anderson ('970) are widely used in the sausage casing art for a wide variety of sausage casings. Thus, there is no persuasive reason why one would not incorporate Anderson's ('970) common fillers into Hisazumi's ('406) product. Applicant does not set forth any analysis

to support its conclusion of why Hisazumi's ('406) product containing fillers can not be smoke-permeable.

**19.** In response to Applicant's arguments (*See p. 8, paras. 2-5 of Applicant's Paper filed 10/30/2009.*) that Hisazumi ('406) does not teach acidic liquid smoke because Hisazumi ('406) smoke is gaseous and not liquid as Applicant's smoke is generated by heating (and evaporating) wood next to water, it is noted that Applicant's arguments are not persuasive. The smoke in Hisazumi's ('406) sausage is not gaseous but rather the smoke has condensed into the structure of the sausage. During the manufacture of Applicant's sausage its smoke also condenses into the structure of the sausage.

**20.** In response to Applicant's arguments (*See p. 8, paras. 2 and 4-5 of Applicant's Paper filed 10/30/2009.*) that dependent claim 19 is not unpatentable over Hisazumi ('406) for the reasons set forth regarding amended independent claim 1, it is noted that no further precise arguments are set forth than discussed above.

**21.** In response to Applicant's arguments (*See p. 8, paras. 6-7 of Applicant's Paper filed 10/30/2009.*) that it would not have been obvious to shirr Hisazumi's ('406) product as taught by Hammer ('886) because the composition of Hisazumi's ('406) and Hammer's ('886) casing are different, it is noted that shirring is very common in the sausage art and there is nothing in the record to indicate that Hisazumi's ('406) product is not capable of being shirred.

**22.** In response to Applicant's arguments (*See p. 9, paras. 1-2 of Applicant's Paper filed 10/30/2009.*) that it would not have been obvious to stuff Hisazumi's ('406) casing with an emulsion, per dependent claim 23, as taught by Krallmann ('502) because the

casings have different compositions, it is noted that the primary purpose for making sausage casings is to stuff them with sausage emulsions and it does not matter whether the composition of one casing may be different from another.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to BRENT T. O'HERN whose telephone number is (571)272-6385. The examiner can normally be reached on Monday-Thursday, 9:00-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Brent T O'Hern/  
Examiner, Art Unit 1783  
June 30, 2010